

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 24, 2008

ATLANTA HARDY v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2002-D-1927 J. Randall Wyatt, Jr., Judge

No. M2007-01498-CCA-R3-PC - Filed July 30, 2008

A Davidson County jury convicted the Petitioner, Atlanta Hardy, of second degree murder, and the trial court sentenced her as a violent offender to sixty years in prison. The Petitioner filed a petition for post-conviction relief claiming, among other things, that she received the ineffective assistance of counsel. The post-conviction court appointed counsel, and, after a hearing, it dismissed the petition. The Petitioner appeals that dismissal contending that her trial counsel was ineffective for failing to: (1) visit the Petitioner and keep her informed about her case; (2) cross-examine all of the State's witnesses; and (3) properly investigate the case. Finding no error, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Dumaka Shabazz, Nashville, Tennessee, for the Appellant, Atlanta Hardy.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Jennifer L. Bledsoe, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Kathy Morante, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts

A Davidson County Grand Jury indicted the Petitioner for one count of first degree murder. In our opinion on the Petitioner's direct appeal, we summarized the evidence presented at her trial as follows:

Charles Carter, the godfather of Carlos Hardy's child, testified that he knew both of the appellants. Carlos Hardy contacted Mr. Carter in 2001 or 2002 to "start a lawncare company." The two started Hardy Lawncare and quickly got jobs cutting grass for commercial and residential customers. At some point thereafter, Brian Hunter, the victim, asked Mr. Carter if he could join the business, "so [Mr. Carter] talked to Carlos [Hardy] about it, including him in on the business." Mr. Carter bought the first lawnmower for the business, and at some point the victim bought a second lawnmower for \$7,500.

Carlos Hardy was in charge of the money of the business. Mr. Carter explained that Carlos Hardy paid him, but he did not know if he paid the victim or not. At some point, the victim became angry at Carlos Hardy because he "felt like he wasn't . . . being treated fair or Carlos wasn't doing him right about the money." The victim went so far as to threaten Carlos Hardy. According to Mr. Carter, the business was supposed to pay the victim back for the lawnmower he purchased for \$7,500.

On June 7, 2002, Carlos Hardy and Atlanta Hardy came to Mr. Carter's house to pick him up to go to River Park to "cut some brush." Atlanta Hardy was in the truck because "[s]he needed some money to get a car, or something, out of pawn." Atlanta Hardy was Carlos Hardy's cousin and had worked with them before in the lawncare business when she needed money because she was "proficient in cutting grass." Carlos Hardy was going to pay Atlanta Hardy two hundred dollars for her work that day.

On the way to River Park, the victim called Mr. Carter about getting paid for the lawnmower. Mr. Carter explained to the victim that they did not have any money, but told him that he would "see what [he] could do." Mr. Carter stated that he went to "West End and got seven hundred and fifty dollars" and figured that the money would "calm" the victim down. The trio went to a duplex on 16th Street at about 12:30 p.m. where they kept their lawn equipment. The victim arrived in his car shortly thereafter. Mr. Carter explained that the victim was "smiling, joking, like he always [was]." At that time, Mr. Carter and the victim went into the duplex where Mr. Carter paid the victim the seven hundred fifty dollars and told him to let the "conversation between you and Carlos, you know, let that die." At that point, according to Mr. Carter, the victim started talking loud, "some kind of rhetoric, . . . intentionally so Carlos could hear it." Mr. Carter testified that Carlos Hardy entered the duplex and told the victim that he wanted him "out of the business." Atlanta Hardy followed Carlos Hardy into the duplex and the victim "said a derogatory term, you know, 'I don't want this bitch in here.' "

Mr. Carter testified that after the victim called Atlanta Hardy "a derogatory term," Mr. Carter saw Atlanta Hardy point a gun at the victim. The victim started to back up and asked Mr. Carter for help. Mr. Carter stated that he

stepped in front of the victim and told Atlanta Hardy that “it ain’t gotta go down like this.” Mr. Carter testified that Atlanta Hardy told him to “move.” Mr. Carter stated that the gun went off, and he dropped to the floor. After dropping to the floor, Mr. Carter saw Carlos Hardy holding a gun. Mr. Carter crawled out of the duplex.

Once Mr. Carter got outside, he told Albert Claybrooks, who was standing outside the duplex, that Carlos Hardy and Atlanta Hardy were inside killing the victim. Mr. Carter testified that he heard the victim screaming and heard multiple shots. After the gunfire ceased, Carlos Hardy and Atlanta Hardy came out of the duplex and told Mr. Carter to leave with them. Mr. Carter refused, so the two Hardys left together in the truck. Mr. Claybrooks drove away from the area in his own car. At that time, Mr. Carter walked back into the apartment to look at the victim. “He was facing twisted, laid down like this (indicating), looking everywhere in a pool of blood.” Mr. Carter told the woman who lived in the front duplex to call the police and then he left the scene because he was on probation for drug charges and “got nervous.”

A few days after the incident, Mr. Carter spoke with Detective Coleman of the Metro Nashville Police Department about the shooting. Mr. Carter admitted that he initially tried to protect Carlos Hardy by telling the police that he did not see Carlos Hardy with a gun, but later told the truth about the shooting. Mr. Carter commented at trial during his testimony that he took a lie detector test at the police station.

Albert Claybrooks, a friend of Mr. Carter’s, testified that he knew both of the appellants. On June 7, Mr. Claybrooks saw both of the appellants and Mr. Carter at the duplex and drove up to see them. When he drove up, Mr. Carter and Carlos Hardy were “[j]ust sitting out back.” Mr. Claybrooks testified that they sat out back and talked as Mr. Carter and Carlos Hardy waited on the victim to arrive so that they could “pay him some money.” Mr. Claybrooks stated that the victim arrived about a half an hour later. When the victim arrived, he and Mr. Carter entered the duplex. Mr. Claybrooks stayed outside with Carlos and Atlanta Hardy and made “small talk.” A few moments later, Carlos Hardy entered the duplex. As Carlos Hardy entered the duplex, Mr. Claybrooks asked him to ask the victim to move his car. Atlanta Hardy followed Carlos Hardy inside shortly thereafter.

Mr. Claybrooks remained outside the duplex, waiting for the victim to move his car. As he waited, he heard an argument inside the duplex. Then, he “heard a gunshot It kind of scared [him], because [he] wasn’t expecting that.” Mr. Claybrooks explained that after the shot went off, Mr. Carter ran out the door “immediately.” Mr. Claybrooks did not see Mr. Carter with a weapon and Mr. Carter appeared “shook [sic] up.” Once Mr. Carter exited the duplex, Mr. Claybrooks heard more shots and some screaming and shouting. After the shots were fired, the appellants exited the duplex, headed toward their vehicle and

left. Mr. Claybrooks did not see the victim exit the duplex, so he knew that “something happened.” At that time, Mr. Claybrooks left the area.

Officer Christopher James Brennan of the Metro Nashville Police Department investigated the murder of the victim. When he arrived at the scene, Officer Brennan saw the victim’s car in the alley with the engine running and the stereo playing. There were other officers already on the scene when he arrived, but the victim’s body was still in the apartment. Officer Brennan stated that the victim was “laying partially in between the kitchen area and what appeared to be the living room area.” The officer collected five shell casings and three “projectiles,” or bullets. The officer also found three taped packages “that look[ed] [like] they were taped in a . . . brick, a flat package that we found in a plastic bag that was stuffed down inside another bag in the living room That those taped packages had been opened. And what was ever inside of them had been taken out.” Officer Brennan explained that the packages looked like those that ordinarily contained cocaine. Officer Brennan explained that the victim was found in his white underwear with his jeans around his ankles. The victim’s car contained a Glock seventeen, nine-millimeter handgun in the trunk and a “green leafy substance” in several mason jars in the center console.

Maria Hardy, the sister of Atlanta Hardy and cousin of Carlos Hardy, testified that sometime on the afternoon of June 7, Atlanta and Carlos Hardy arrived at her grandmother’s house at 3007 Hummingbird Drive. Maria Hardy explained that she:

[C]ame down the steps. And when I came down the steps, . . . I seen [sic] my sister. And I was asking my sister, I said ‘what’s going on, you know? What have you done?’ And the next thing I know, Carlos came. And he said, ‘I need to talk to you, Kita. Kita is Atlanta Hardy. He called her Kita. So she said, ‘whatever you’ve got to say to me, you can say it right here.’ So, then, about that time, Carlos shut the door. And he said that . . . he told Kita the check should be in the mailbox and stuff like that He told her, you know, he was gonna take care of her I did hear him say he was gonna take care of her.

Maria Hardy testified that Carlos Hardy wanted Atlanta Hardy to “take the rap for him.” Maria Hardy then heard Carlos Hardy tell Atlanta Hardy that she should get a wig, leave town and go to Detroit.

Marion Ford, Atlanta Hardy’s mother and Carlos Hardy’s aunt, testified that she also saw the appellants at the home on Hummingbird Drive on the afternoon of June 7. When the appellants pulled up to the house in a truck, they asked Marion Ford and her mother to come inside. Once they got inside the house, Carlos Hardy informed them three times that he “killed a guy.” At that

point, Marion Ford claimed that the phone rang and Carlos Hardy ordered her not to answer the phone. Carlos Hardy took the phone, broke it and threw it across the room. Ms. Ford then testified that Carlos Hardy went around closing curtains. Carlos Hardy informed Ms. Ford that he hid the gun under the mattress. At that point, Ms. Ford claimed that Carlos Hardy got the gun, wrapped it into a quilt and brought it back into the kitchen. Ms. Ford took the gun, put it in a plastic Kroger bag and drove off "on the highway." According to Ms. Ford, she drove to exit 24, where she "pitched it out." Ms. Ford later informed the police where she allegedly disposed of the gun. The gun was never located.

Wayne L. Hughes, an officer with the Metro Nashville Police Department's Forensics and Firearms Unit, testified as an expert in firearms and toolmark identification. According to Officer Hughes, the bullets fired at the crime scene could not have been discharged from the gun found in the victim's car. The officer explained that the .380 caliber bullets and shell casings found at the crime scene came from the same firearm. Officer Hughes also stated that the two .22 caliber bullets from the crime scene came from the same firearm.

John E. Gerber, a medical examiner with Forensic Medical in Nashville, testified as an expert in forensic pathology. Dr. Gerber performed the autopsy on the victim. According to Dr. Gerber, the victim was shot eight times: on the left back of the head; on the left side of the head; on the right side of the jaw; twice in the upper left chest; in the upper left back; in the right lower back; and in the right arm. Dr. Gerber also located gunpowder stippling on the victim's "right lateral portion of the wrist and base of the thumb," meaning that the handgun was between "six inches and two feet away" from the victim when it was fired. Dr. Gerber explained that the stippling was not caused by the victim firing a gun, but rather by someone else shooting the victim at a very close range. Dr. Gerber described the cause of death as "multiple gunshot wounds of the head, torso, and the right upper extremities."

Samuel Holt, Carlos Hardy's stepfather, testified that Carlos Hardy told him that Atlanta Hardy "killed a man" on the afternoon of June 7. Mr. Holt testified that about fifteen minutes after Carlos Hardy informed him about the shooting, Atlanta Hardy approached him and Carlos and began talking about the murder. According to Mr. Holt, Atlanta Hardy laughingly admitted that she shot the victim several times, then went through his pockets to see if he had any money.

Carlos Hardy testified on his own behalf. He stated that he owned a lawncare service named Hardy's Lawncare and that Mr. Carter worked with him in the business. According to Carlos Hardy, he gave Mr. Carter a job because he "was a friend of mine from way back He was in a Federal Halfway House. You know, I gave him a job to try to help him out." Carlos Hardy explained that he was "real good friends" with the victim. He claimed that Mr. Carter wanted to

bring the victim into the business, but he was hesitant. According to Carlos Hardy, the victim and Mr. Carter purchased a lawnmower. Carlos Hardy claimed that the business “didn’t need no [sic] equipment.”

On the day of the murder, Carlos Hardy explained that Atlanta Hardy called him and told him that she “needed some money, to work.” Initially, Carlos Hardy did not want to offer Atlanta Hardy a job, but felt a duty to do so, because she was “family.” Carlos Hardy and Atlanta Hardy drove to Mr. Carter’s house to pick him up. On the way there, Carlos Hardy received a telephone call from the victim, who wanted money. Once the two picked up Mr. Carter, they drove to the duplex on 16th Avenue where they stored all of their equipment. Shortly after they arrived, Albert Claybrooks came by the duplex. Carlos Hardy explained the victim showed up shortly thereafter. According to Carlos Hardy, Mr. Carter and Mr. Claybrooks went into the duplex to discuss something, then came back out.

Then, Mr. Carter and the victim entered the duplex. At that point, Carlos Hardy claims that he heard “arguing.” Carlos Hardy claims that he went “in to see what they was [sic] arguing about.” Carlos Hardy realized that the two were arguing about the money for the lawnmower. Atlanta Hardy entered the duplex. Carlos Hardy claims the victim asked, “who is this bitch?,” referring to Atlanta Hardy. At that point, Carlos Hardy claims that the victim went toward Atlanta Hardy, then he heard shots. He admitted that he did not see the victim with a gun, but that he did see Atlanta Hardy with a weapon. Once he heard shots, Carlos Hardy explained that his main focus was going out of the door. Carlos Hardy testified that he did not have a gun that day. Atlanta Hardy exited the duplex after Mr. Carter. The two appellants left in the truck.

Carlos Hardy claimed that Atlanta Hardy dropped him off at his grandmother’s house. He stated that Ms. Ford was not present and that he explained everything to his grandmother. Later, Atlanta Hardy and a friend named “Poochie” showed up at the house. Carlos Hardy testified that he told his stepfather that Atlanta Hardy shot the victim, but did not listen to the conversation that Atlanta Hardy had with his stepfather.

On cross-examination, Carlos Hardy admitted that he wrote the victim a check for \$1,600 three days prior to the murder, but denied that he stopped payment on the check. Instead, he claimed that there was not enough money in his account to cover the check.

Atlanta Hardy testified that she worked on a couple of occasions with her cousin Carlos Hardy in his lawncare business. On the day of the murder, Carlos Hardy picked her up and the two drove to pick up Mr. Carter. When the three arrived at the duplex where the equipment was kept, Mr. Carter exited the vehicle while she and Carlos Hardy stayed in the truck. Atlanta Hardy remembered that Mr. Claybrooks arrived approximately five minutes later and went into the

apartment. After Mr. Claybrooks and Mr. Carter exited the duplex, the victim pulled up in a black Monte Carlo.

According to Atlanta Hardy, Mr. Carter and the victim then entered the duplex. She claimed that she could not hear loud voices coming from inside. Atlanta Hardy stated that Carlos Hardy entered the duplex and “the next thing [she] heard” was a gunshot. When she turned around, Mr. Carter exited the duplex, followed closely by Carlos Hardy. Carlos Hardy got in the truck with Atlanta Hardy, and he drove the two to their grandmother’s house. Atlanta Hardy testified that Carlos Hardy asked her to “take the rap for him” and instructed her to go to Detroit.

Atlanta Hardy stated that when she saw her photograph on television, she got a lawyer and went to the police station to give a taped statement to “let ‘em know that [she] hadn’t done anything wrong.”

On cross-examination, Atlanta Hardy admitted to several prior felony convictions, but denied ever entering the duplex on the day of the murder. She claimed that everyone was trying to “frame” her for the murder.

Patricia Owens lived in the front portion of the duplex on 16th Avenue North where the victim was murdered. She testified that she was laying on her sofa when she heard a “ruckus.” Ms. Owens got up off her sofa, went to the door, heard what sounded like gunshots and called the police. After the gunshots were fired, Mr. Carter came to her door and asked to use her telephone. Ms. Owens claimed that she also called her husband, and that Mr. Carter spoke to him. She saw Mr. Carter get into a car and leave the area.

State v. Carlos Hardy & Atlanta Hardy, No. M2004-02249-CCA-R3-CD, 2006 WL 359677, *1-6 (Tenn. Crim. App., at Nashville, Feb. 10, 2006), *perm. app. denied* (Tenn. July 3, 2006). This Court affirmed the Petitioner’s conviction and sentence on appeal. *Id.* at *1.

The Petitioner filed a petition for post-conviction relief, alleging in part that her trial counsel was ineffective. At the hearing on her petition, the following evidence was presented: O. Bobby Brown testified that he is a licensed private investigator and a paralegal. Through one of his investigations, he encountered a man named Charles Carter,¹ who had participated in a controlled buy for the police department. Brown learned of Carter’s involvement in the homicide for which the Petitioner was convicted, and he assumed that Carter participated in a controlled buy to make him more credible with the police. The investigator learned that there was \$7500 and two kilograms of cocaine that had not been recovered by police in the homicide case. The police, therefore, went to talk to the Petitioner’s mother, who gave them more

¹Charles Carter was one of the main witnesses who testified for the State at the Petitioner’s trial.

information about Carter. He learned that Carter was having financial difficulties during the time when he and Carlos Hardy started the lawn business.

Brown went to interview the Petitioner as part of his investigation. She gave him her account of what had taken place the day of the murder. She told him that when she was going to cut grass with Carter and Hardy, Carter asked Hardy “did he have iron.” The Petitioner did not know the significance of this phrase and dismissed it, but the investigator knew that it meant Carter asked Hardy if he had his gun with him. Brown said that Hardy received twenty-five years in prison for his involvement with this homicide, the Petitioner received life, and Carter received no punishment. He theorized that Carter participated in the drug buy to help his position with police and to help himself in the homicide investigation. Brown said that he also interviewed witnesses from the Petitioner’s neighborhood, and he thought they would have been helpful to the Petitioner’s case had they been called by her attorney at her trial.

On cross-examination, Brown conceded that none of those witnesses were present at court for the post-conviction hearing. He said that he was not alleging that someone made a deal with Carter in exchange for his testimony but that Carter worked with police to help make him more believable.

The Petitioner’s trial counsel (“Counsel”) testified that he saw the Petitioner in court over seventeen times, and, in addition to that, he met with her in prison around five or six times. Counsel said that his main concern was getting an investigator due to the severity of the charges. Counsel said that the State’s final offer to the Petitioner was seventeen years at one hundred percent in exchange for her plea of guilty. Counsel explained “in laborious detail” the ramifications of going to trial, the facts of the case, and the evidence against her. The Petitioner told him that she wanted to take that offer and would do so at the next court appearance. At the following court appearance, the Petitioner said that she was not going to take the deal because she was confident that the State’s witnesses were her family and would not testify against her. Counsel wrote a letter memorializing that he had advised her to take the State’s offer and the ramifications of her rejecting the offer, and he had the Petitioner sign the letter acknowledging that she understood.

Counsel testified that he did not recall a witness for the State, Samuel Holt. He did not recall whether he cross-examined him, and he did not specifically recall the Petitioner handing him a note with questions to ask Holt on cross-examination. Counsel said that he had explained lesser included offenses to the Petitioner, but he focused their conversations on what would happen to the Petitioner if she was convicted of first degree murder. This was true especially in light of the fact that the Petitioner was a Range III Career Offender and would, therefore, be facing a minimum of fifty-one years in prison.

Counsel said that he did not recall the Petitioner asking him to call Orlando Hardy, Evelyn Bell, and Algeron Coates to testify. He also did not recall her asking him to investigate Kendra Moore, Michelle Harris, and Michael Ford. Counsel recalled that one witness, Maria Hardy, testified that Carlos Hardy had asked the Petitioner to take responsibility for the murder, and he would take care of the Petitioner’s family. He did not recall the Petitioner telling him

that, perhaps, Algeron Coates was also present during this conversation. Counsel said that the Petitioner had a conversation with her uncle that he learned about, but he felt that part of that conversation was inculpatory.

On cross-examination, Counsel testified that the investigator that he hired for this case does a very thorough job, and he did so with this case. Counsel said the investigator interviewed everyone who needed to be interviewed. The investigator followed up on every lead provided to them by the Petitioner. Counsel said the Petitioner's theory of defense was that Carter was a liar and had given several different stories about the events surrounding the murder. Counsel cross-examined Carter about his previous convictions and about the fact he was on federal probation for drug convictions. Counsel said both he and the State's attorney thought that the Petitioner would be acquitted because Carter's cross-examination had gone so well. Counsel said that during the defense proof a lot of evidence came in that supported Carter's testimony. Counsel said that both he and Carlos Hardy's attorney wanted to put on no defense proof because they felt the State's case was very weak. Carlos Hardy testified, against his trial counsel's advice, which strategically "forced" Counsel to call the Petitioner to testify.

Counsel said that the Petitioner gave him several versions of what had happened that evening, including that she was outside without a gun, that she was inside without a gun, that she was inside with a gun but did not shoot the gun, and finally, that she was inside with a gun and shot the gun but did not shoot anyone.

On redirect examination, Counsel testified that he filed a motion to reopen the proof because his investigator had found Patricia Owens. The trial court allowed Owens to testify in a jury out hearing, and her testimony was that she was scared of Carter when she saw him the day of the murder. Counsel said that Owens was located using an address provided by the Petitioner.

The Petitioner testified that Counsel never came to visit her while she was incarcerated. The Petitioner requested information from the prison about how many times they documented Counsel coming to visit her, and the response letter indicated that there were no such visits. The Petitioner said that her visits with Counsel were always brief because he was always in a hurry and that the two only met at her court appearances. The Petitioner also said that there were several times that she was taken to court and Counsel never arrived for her court appearance. One time after Counsel failed to appear, she asked the judge for a new attorney, and this angered Counsel. The Petitioner described Counsel as being disinterested in her case and having little patience. The Petitioner said that Counsel never advised her of court dates, and she did not learn that she was needed in court until the day of her appearance.

The Petitioner testified that she did not receive any discovery materials until her post-conviction attorney gave them to her. She learned from her post-conviction attorney that there were multiple pictures included in the discovery, none of which she saw before her trial. In preparation of her own defense, the Petitioner received letters from Carlos Hardy, which she gave to Counsel because they contained incriminating statements. Counsel told her that they did not need the letters. The letters, which the Petitioner introduced at the hearing, included

statements by Hardy about the Petitioner pleading guilty to the murder in exchange for a lesser sentence.

The Petitioner testified that the investigator, Wells, came to jail to see her and told her to sign a piece of paper. She understood that the document purported to be granting her permission for Counsel to interview her relatives. It was not until after her trial that she learned that the document stated that Counsel had advised her not to go to trial but to accept the plea deal offered to her by the State. The Petitioner acknowledged that, directly above her signature, there was written in all capital letters not to go to trial but to accept the plea offer.

The Petitioner testified that Counsel did not discuss lesser-included offenses with her. He told her that she could be successful if she went to trial, and he did not express any concern about whether Carlos Hardy would testify. Counsel also wrote a letter to the Petitioner in which he apologized to her for his delay in getting in touch with her and told her that he was going to hire a ballistics expert in her case. The Petitioner said, however, Counsel never hired such an expert.

The Petitioner further testified that she asked Counsel to contact several witnesses, a few of whom would have testified that Carlos Hardy had written them checks to try to get the Petitioner to take the blame in this case. The Petitioner said that another witness, Orlando Hardy, her son, would have testified that Carlos Hardy had threatened him with regard to this case. Investigator Wells said that he could not locate another witness, Algeron Coates, but the Petitioner opined that he never really tried.

The Petitioner said that Counsel did not cross-examine Samuel Holt, who was a witness for the State at her trial. She asked him to impeach Holt. Holt testified at her trial that he was Carlos Hardy's step-father, which the Petitioner said was untrue. Further, Holt testified that the Petitioner told him that she shot the victim and then went through his pockets looking for money. The Petitioner reminded Counsel that the police officer testified that the victim was found with a large sum of money in his pocket. She asked Counsel to impeach Holt with this testimony. The Petitioner testified that she also asked Counsel to impeach Carlos Hardy by asking questions that Counsel never asked. She wanted Counsel to question Hardy about several write-ups for violent behavior that Hardy had received while incarcerated.

The Petitioner said that she did not accept the plea offer because she could not plead guilty to something that she did not do. Further, she said that Counsel could have been successful at trial if he had represented her to his fullest.

On cross-examination, the Petitioner conceded that, when she asked the prison secretary for records of Counsel's visits, she did not give the prison secretary Investigator Wells's name. She asserted that Counsel was untruthful when he said that they met more than three or four times to discuss the case and that he had come to visit her in prison. The Petitioner said that Counsel told her that the State had offered her seventeen years in exchange for her plea, but he did not tell her whether he thought she should take that plea deal.

The Petitioner said that the letter containing her signature, in which Counsel advised her to take the plea deal, had been altered. When she signed the letter, it did not say in all capital letters to not go to trial and to take the plea deal. She opined that Counsel added that portion of the letter after she signed the letter. She said that she would have read that portion of the letter before signing it, and she was confident that she had not seen it before.

About the discovery materials, the Petitioner agreed that nothing contained in the discovery would have convinced her to plead guilty, but she felt Counsel still should have discussed the materials with her. The Petitioner said that Counsel was untruthful when he testified that she had told him that she was present at the time of the murder. She also testified that she expected Carlos Hardy to testify at trial, and she expected him to blame her for the shooting. She did not care, however, because she had a letter from him in which he encouraged her to take a voluntary manslaughter charge. She thought this proved that he was trying to get the Petitioner to take responsibility for a crime that Hardy committed.

The Petitioner agreed that Algeron Coats and Orlando Hardy were not present at the post-conviction hearing. The Petitioner said that Counsel should have cross-examined Holt. She felt that, if Counsel had impeached Holt about lying about being married to Carlos Hardy's mother, the jury would have discredited Holt. On redirect examination, the Petitioner said that she also asked Counsel to impeach Holt about his prior criminal history, and Counsel refused.

Marion E. Ford, the Petitioner's mother, testified that Counsel was not present when the docket was called on the Petitioner's first court date in this case. Counsel did not arrive until 10:15 a.m., and he appeared nervous. Ford testified that Counsel never seemed to have time to talk to her about the Petitioner's case. Ford asked Counsel if she should get another attorney, and he told her that she did not need to because the State would be paying the attorney either way. Ford testified that Counsel told her that he was not worried about the case but that the Petitioner should have taken the plea deal offered to her. He said that he was not concerned about her refusing the plea deal because he was going to get more money to take the case to trial. Ford testified that she repeatedly tried to call Counsel, but he never returned her phone calls. She said that Counsel never went to see the Petitioner when she was in prison.

Based upon this evidence, the post-conviction court denied the Petitioner's petition.

II. Analysis

On appeal, the Petitioner contends her trial counsel was ineffective for failing to: (1) visit the Petitioner and keep her informed about her case; (2) cross-examine all of the State's witnesses; and (3) properly investigate the case.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning

the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and Article I, section 9 of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland*, 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a petitioner in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of

ineffective assistance of counsel, ‘we address not what is prudent or appropriate, but only what is constitutionally compelled.’” *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *Id.*

If the petitioner shows that counsel’s representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994). When a petitioner makes a claim of ineffective counsel within the context of a guilty plea, the petitioner must demonstrate a reasonable probability that, but for counsel’s deficiency, the petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59(1985); *Manning v. State*, 833 S.W.2d 635, 637 (Tenn. Crim. App. 1994).

The Petitioner first contends that Counsel failed to visit her and keep her informed about her case. The Petitioner asserts that her meetings with Counsel were insufficient to fully discuss the potential strategies and tactical choices. She further complains that Counsel was ineffective for not providing her a copy of discovery. The post-conviction court found:

The Court finds that [Counsel] testified that he met with the Petitioner on numerous occasions at the prison facility. The Court finds that [Counsel] stated that these meetings were arranged by his investigator, Mr. Patrick Wells. The Court finds that [Counsel] also met with the Petitioner during her numerous court dates. The Court finds that [Counsel] testified that he fully discussed the Petitioner’s case during these visits. The Court finds that [Counsel] explained to the Petitioner the evidence facing her as well as the ramifications of going to trial. While a dispute exists as to the number of meetings that occurred between [Counsel] and the Petitioner at the prison facility, the Court is satisfied that [Counsel] and Mr. Wells sufficiently met with the Petitioner in preparation for this case. The Court is therefore of the opinion that this allegation is without merit.

The post-conviction court also found that “[Counsel] met with the Petitioner frequently during the pendency of her case. . . . [Counsel] sent the Petitioner a letter, which she subsequently signed, which indicated that she rejected the State’s final plea offer and wished to proceed to trial.”

We conclude that the Petitioner has not proven by clear and convincing evidence that Counsel was ineffective. The Petitioner alleges that Counsel never visited her to discuss her case while she was in prison. She provided documentation showing that he never requested such a visit. Counsel, however, testified that Investigator Wells arranged for him to meet with the Petitioner on five or six occasions. Further, he testified that he met with the Petitioner over seventeen times at her court appearances. This does not constitute clear and convincing evidence that Counsel inadequately communicated with the Petitioner.

Further, the Petitioner has failed to prove prejudice with respect to this allegation. She clearly testified that there was nothing in the discovery materials that would have convinced her to plead guilty rather than going to trial. She also failed to prove that the outcome would have been different had she communicated with Counsel more. Accordingly, she is not entitled to relief on this issue.

The Petitioner next contends that Counsel was ineffective for failing to cross-examine all of the State's witnesses, including Holt. At the post-conviction hearing, the Petitioner said that Holt testified at her trial that he was Carlos Hardy's step-father, which the Petitioner said was untrue. Further, Holt testified that the Petitioner told him that she shot the victim and then went through his pockets looking for money. The Petitioner reminded Counsel that the police officer testified that the victim was found with a large sum of money in his pocket. She asked Counsel to impeach Holt with this testimony, which she asserted he did not do. Counsel testified at the hearing that he did not specifically recall whether he cross-examined Holt and whether the Petitioner requested that he ask Holt certain questions.

The post-conviction court found that Counsel adequately represented the Petitioner. Further, the court found that "no evidence was presented at the [post-conviction] hearing which supports the allegation that [Counsel] disregarded the Petitioner's suggestions." We agree and conclude that the Petitioner has not proven by clear and convincing evidence that Counsel was deficient or that she was prejudiced.

Lastly, the Petitioner contends that Counsel failed to properly investigate her case. She complains that Counsel failed to investigate whether Carlos Hardy had written checks to bribe her to take responsibility for this crime for him. Further, that Counsel failed to hire a ballistics expert to assist in determining who shot the gun in question. The post-conviction court found:

[Counsel] received and reviewed the discovery in the Petitioner's case. The Court finds that [Counsel] hired an investigator, Mr. Patrick Wells, to investigate the facts and potential witnesses of the case. The Court finds that [Counsel] properly researched the backgrounds of the State's witnesses in preparation for cross examination. The Court finds that [Counsel] adequately cross examined the State's key witness, Mr. Charles Carter. The Court finds that [Counsel] was successful in locating a missing witness, Ms. Patricia Owens, whose testimony was introduced, by permission of the Court, after the proof had closed. The Court further finds that [Counsel] was successful in eliciting testimony from Ms. Owens which further impeached the testimony of Mr. Carter.

The Court is of the opinion that [Counsel] adequately investigated the facts of this case and that this allegation is without merit.

The evidence does not preponderate against the post-conviction court's finding that Counsel was not ineffective in this regard. Counsel hired an investigator who thoroughly investigated the facts of this case. Counsel found, or attempted to find, all of the witnesses that he recalled the Petitioner mentioning. Counsel did not recall the Petitioner mentioning Hardy's alleged bribe or witnesses who would testify about any bribe. Importantly, the Petitioner failed to introduce any checks purporting to be from a bribe. Further, the Petitioner did not call as a witness at the post-conviction hearing any witness that Counsel failed to introduce at trial. She has, therefore, failed to prove Counsel was ineffective and failed to show how any alleged deficiency on his behalf prejudiced her.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court.

ROBERT W. WEDEMEYER, JUDGE